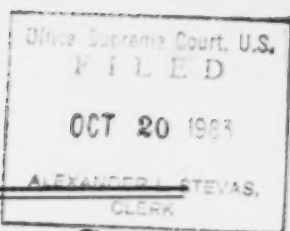


No. 83-3



In the Supreme Court of the United States

OCTOBER TERM, 1983

SUSANNA M. BAGINSKY, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE FEDERAL CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner seeks review of the decision of the court of appeals, that her discharge was in compliance with Veterans Administration ("VA") regulations, on the grounds that the court erred by misapplying the "clearly erroneous" standard to findings of the trial court and by making its own findings on petitioner's claim instead of remanding the issue to the Claims Court.

1. Petitioner is a physician who specializes in pathology. On April 15, 1973, petitioner began work under a three-year probationary appointment as Chief of Laboratory Services at the Brockton, Massachusetts Veterans Administration Hospital (Pet. App. 3a). By all accounts, petitioner experienced substantial problems in running the laboratory. There were serious morale problems among employees and the laboratory's accreditation was in jeopardy (*id.* at 3a, 25a).

Regulations governing probationary employees at the hospital required the Chief of Staff, Dr. John F. Conlin, to prepare an annual proficiency report, which he prepared for petitioner on April 15, 1974 (Pet. App. 5a). In his report, Dr. Conlin gave petitioner a "satisfactory," but very low, rating and expressed his opinion that the laboratory was not running smoothly and that her " 'retention is contingent upon a substantial improvement in her performance' " (*ibid.*). On April 22, Dr. Conlin met with petitioner regarding her work record, but the details of that conversation were disputed (*ibid.*).

During 1974, petitioner continued to have difficulty administering the hospital's laboratory services. On November 15, Dr. Conlin prepared a second report, which again discussed petitioner's inadequate performance. Three days later, Dr. Conlin met with petitioner and mentioned a number of areas in which her performance was deficient. Pet. App. 6a. On February 10, 1975, he prepared a special proficiency report, which again criticized petitioner's job performance (*id.* at 7a). Finally, the Hospital's Professional Standards Board convened to consider whether petitioner was qualified and, after considering oral and written statements from various VA hospital employees, the Board recommended petitioner's dismissal on grounds that her performance was unsatisfactory. Petitioner was discharged on May 19, 1975 (*ibid.*).

2. Petitioner filed suit against the United States initially in the United States District Court for the District of Massachusetts, but the action was transferred to the Court of Claims. Her amended petition contained three counts: Count I alleged that the VA had failed to follow its regulations requiring counselling prior to discharge (Pet. App. 89a-94a); Count II alleged a deprivation of due process because the Professional Standards Board considered material not made available to petitioner (*id.* at 94a-97a); and

Count III asserted that the discharge lacked a rational basis (*id.* at 97a-98a). On the government's motion, the Court of Claims dismissed Count III, but remanded Counts I and II to the trial division, *inter alia*, "to determine whether [petitioner had been] shown her proficiency report dated April 15, 1974 at that time or given counselling as the Manual requires" (*id.* at 8a).

On remand, the court decided to try Count I separately. It found for petitioner and ordered her reinstated (Pet. App. 19a-77a). The court held that the VA had violated its regulations in connection with the April 1974 proficiency report (*id.* at 9a), which the court concluded was the only issue to be decided under the Court of Claims remand order.

The court of appeals¹ reversed (Pet. App. 1a-18a). The court held that the trial division had unduly limited the issue on remand by considering whether counselling had been given *only* in connection with the April 1974 proficiency report (Pet. App. 9a). The court of appeals found that the remand had "contemplated a full review of the broader issue whether, prior to her discharge, [petitioner] had been given the counseling the Manual required" (*id.* at 10a).

Instead of vacating the reinstatement order and remanding the case for reconsideration in light of the broader issue posed, the court of appeals chose to "decide the counseling issue" because "the record leaves no question as to the decision that must result from a remand" (Pet. App. 10a). The court of appeals found that, although the VA had not shown petitioner her 1974 proficiency report or counselled her with regard specifically to that report, petitioner had received counselling on at least two occasions prior to the

¹The Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, 96 Stat. 25 *et seq.*, established the United States Court of Appeals for the Federal Circuit. See *United States v. Mitchell*, No. 81-1748 (June 27, 1983), slip op. 22 n.33.

preparation of the special proficiency report in 1975 (*id.* at 14a). Moreover, the court found that on numerous occasions petitioner had been informed of her inadequacies as Chief of Laboratory Services, but had been unable to improve her performance (*ibid.*). Accordingly, the court of appeals held that petitioner's discharge was not barred by the VA's failure to comply with its regulations in 1974 (*id.* at 15a). The court remanded to the Claims Court for trial with regard to petitioner's claim that her discharge violated due process (*ibid.*).²

3. Petitioner argues (Pet. 14-21) that the court of appeals misapplied the clearly erroneous standard under Fed. R. Civ. P. 52(a) when it reversed the "finding" that earlier violations of the VA's regulations in connection with the April 1974 proficiency report tainted her discharge in 1975 (Pet. 18). The decision below, however, was not subject to the clearly erroneous standard in Rule 52(a). The "causation" issue had been decided by the trial division under an erroneous view of the law; its analysis assumed that the Court of Claims had already held that any violations regarding the 1974 proficiency report undermined the VA's discharge of petitioner. The court of appeals unanimously concluded that this was a misreading of the prior remand order and thus that it was appropriate to set aside the trial division's findings because they necessarily ignored certain important facts. The decision to vacate the reinstatement order, which was based solely on the court's reading of the Court of Claims' earlier remand order, obviously does not warrant review by this Court.

²Judge Kashiwa dissented in part (Pet. App. 16a-18a). He agreed that the judgment should be vacated, because the trial division had misinterpreted the remand order and thus improperly limited the issue on Count I. However, Judge Kashiwa would have remanded the issue of whether the later counselling had been adequate to satisfy the regulations.

Second, petitioner argues (Pet. 21-28) that after the court of appeals held that the trial division had committed legal error, it was required to remand Count I to the trial division for further findings. But it is elementary that where, as here, a remand would serve no purpose, an appellate court need not order one. As this Court held in *Pullman-Standard v. Swint*, 456 U.S. 273, 292 (1982) (emphasis added), "where findings are infirm because of an erroneous view of the law, a remand is the proper course *unless the record permits only one resolution of the factual issue.*" The court of appeals found that the undisputed record supported the conclusion that Dr. Conlin counselled petitioner twice prior to the February 1975 report and that petitioner repeatedly had been given notice of her deficiencies throughout her appointment (Pet. App. 12a). Accordingly, the court of appeals correctly concluded that on remand the Claims Court could only have found that petitioner had received the counselling required by the regulations prior to her discharge. Review of that factbound determination by this Court is unwarranted.³

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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³Review of petitioner's claim in its present interlocutory posture is particularly inappropriate. The court of appeals remanded the case to the Claims Court to consider petitioner's alternative claim that her discharge violated due process. If petitioner prevails on remand, she will receive reinstatement with back pay. If petitioner does not prevail on remand, she can still seek review in this Court after the final disposition of her case.